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No. 87-215

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM CINTOLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner, an attorney, was improperly convicted of conspiring to obstruct justice based on his performance of "traditional lawyer functions."

2. Whether the trial court erred in excluding certain evidence on hearsay grounds.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A102) is reported at 818 F.2d 980.

JURISDICTION

The judgment of the court of appeals (Pet. App. A103) was entered on May 1, 1987. A petition for rehearing was denied on May 26, 1987 (Pet. App. A104). The petition for a writ of certiorari was filed on July 24, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of conspiring to obstruct justice, in violation of 18 U.S.C. 371. He was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. A1-A102).

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A5-A28). It showed that a federal grand jury in the District of Massachusetts was investigating the illegal gambling and loansharking businesses of Gennaro Angiulo (*id.* at A5-A6). One of the witnesses called before the grand jury was Walter LaFreniere, who possessed information damaging to Angiulo (*id.* at A9). On March 12, 1981, after first being interviewed by an FBI agent, LaFreniere appeared before the grand jury and invoked his Fifth Amendment privilege (*id.* at A10). Thereafter, Angiulo's brother sent LaFreniere to meet with petitioner, an attorney, and LaFreniere became petitioner's client (*id.* at A11). Petitioner later informed Angiulo that he had "got out of" LaFreniere a list of the questions asked LaFreniere both at the FBI interviews and in the grand jury, and petitioner recounted the questions (*id.* at A12-A13).

On March 19, 1981, a federal prosecutor directed LaFreniere to report to the grand jury the following Thursday (Pet. App. A13). That evening Angiulo told petitioner to meet with LaFreniere and to make him "understand[] that he might just go and do eighteen . . . months" (*id.* at A13-A14). Later, Angiulo ordered two of his associates to kill LaFreniere (*ibid.*). FBI agents, who learned of this "death sentence" through court-authorized electronic surveil-

lance of Angiulo's office, warned LaFreniere (*id.* at A15). The next day, in a conversation with Angiulo, petitioner said that he had instructed LaFreniere to talk with no one. Angiulo then directed petitioner "to evaluate [the situation] very carefully" (*id.* at A16).

There followed a series of discussions between Angiulo and his associates concerning the need to coerce LaFreniere into serving an 18-month sentence for contempt rather than accepting immunity and testifying before the grand jury (Pet. App. A17). Angiulo ordered that various kinds of pressure be brought to bear against LaFreniere (*id.* at A17-A19). He told petitioner about assurances he had received that LaFreniere appreciated the personal risk he would run by cooperating with the grand jury (*id.* at 19). Petitioner stated that he told LaFreniere that the maximum he could "do" was 18 months or the life of the grand jury, whichever was shorter (*id.* at A20). On March 26, in petitioner's absence, Angiulo reported that LaFreniere had stated: "[the] lawyer talked to me; he told me to go away for thirty-six months" (*id.* at A21).

On April 1, LaFreniere received immunity and was ordered to testify before the grand jury (Pet. App. A22). Thereafter, petitioner continued to participate in discussions with Angiulo concerning the need for LaFreniere to commit contempt before the grand jury (*ibid.*). At one point, petitioner remarked, "[i]f [the government] can pull him away from me, then maybe they get something out of him" (*id.* at A23). Moments later, petitioner added that his objective was to "get [LaFreniere] into a confident situation, making him think that we can do what we're saying we can do, and all of a sudden smack, he's a . . . goner" (*ibid.*).

Petitioner was a regular participant in discussions during the following month regarding the grand jury investigation (Pet. App. A24). In one conversation, in response to a query by petitioner, Angiulo ordered that a suspected informant be killed (*ibid.*). On April 23, LaFreniere appeared before the grand jury and, reading a statement prepared by petitioner, refused to testify. Notwithstanding the immunity that had been conferred on him, LaFreniere predicated his refusal to testify on Fifth Amendment grounds (*ibid.*). At a hearing, the judge dismissed petitioner's argument that the immunity was inadequate as "clearly frivolous" (*id.* at A24-A25).

Upon leaving court, petitioner went directly to Angiulo's office. Angiulo greeted him with the question, "Is he in jail, just say yes or no?" Petitioner responded, "Not yet" (Pet. App. A25). The two men then dissected in minute detail what had transpired before the grand jury. At one point, petitioner informed Angiulo that the grand jury knew about the contract on LaFreniere's life (*id.* at A25-A26). Angiulo instructed petitioner to tell LaFreniere that if he answered any of the grand jury's questions "you're gonna commit perjury because instead of doing eighteen months you gonna . . . go for five years" (*id.* at A27).

On June 2, 1982, the district court found LaFreniere in contempt and sentenced him to 18 months' imprisonment, which he served in full. Petitioner represented LaFreniere throughout the period of his incarceration (Pet. App. A27).

2. On appeal, petitioner argued that the evidence was insufficient to support a conviction for conspiracy to obstruct justice. He argued that the evidence showed that his motive in assisting Angiulo in his efforts to prevent LaFreniere from testifying was to

obtain information from Angiulo that would assist petitioner in representing the interests of LaFreniere. The court of appeals rejected this argument, finding that the jury had "considerable circumstantial evidence" (Pet. App. A30) entitling it "to disbelieve [petitioner's] testimony regarding his motives and to credit the (entirely plausible) contrary interpretation urged by the government" (*id.* at A31).

The court also rejected petitioner's argument that he could not be convicted of conspiring to obstruct justice on the basis of conduct—advising LaFreniere not to testify—that was not independently illegal. Explaining that an improper motive may criminalize otherwise lawful conduct (Pet. App. A47), the court found that petitioner "was not counseling LaFreniere to invoke legitimate rights for his own benefit" but was participating in "a high pressure, no-holds-barred campaign to induce his nominal client * * * to commit a criminal contempt" (*id.* at A47-A48). The court recognized the dangers of allowing a prosecutor to inquire into the motives of attorneys who do no more than engage in traditional conduct such as filing motions, making court appearances, and the like (*id.* at A56, A58). The court concluded, however, that those dangers were not implicated in this case, because petitioner's "representation of LaFreniere was in no sense 'traditional'" (*id.* at A56-A57). The court found that the evidence clearly demonstrated that petitioner was serving the interests of Angiulo rather than the interests of his ostensible client (*ibid.*).

In addition, petitioner challenged several of the district court's evidentiary rulings, including its exclusion on hearsay grounds of certain notes allegedly prepared by LaFreniere. The court of appeals upheld the exclusion of the notes. It rejected petition-

er's contention that the notes demonstrated LaFreniere's "fixed intention" not to testify and were thus admissible to prove petitioner's state of mind (Pet. App. A85-A86). Finding that the notes contained only a factual recitation of events relating to LaFreniere's first grand jury appearance, the court concluded that they could not "reasonably be read as conveying—or even illuminating—such a mental state" (*id.* at A86). The court further concluded (*id.* at 87 n.12) that any probative value the notes might have had in that regard was "easily outweighed by the improper truth-of-the-matter use which the jury might be tempted to make of them."

ARGUMENT

1. Petitioner contends (Pet. 18-19, 20-28) that he was improperly convicted of conspiring to obstruct justice based on his performance of traditional attorney functions, such as filing motions, taking appeals, and giving advice. That contention is without merit.

Petitioner purposefully conspired with the target of a grand jury investigation to prevent petitioner's client, an immunized witness, from giving testimony to a grand jury. His participation in that conspiracy corruptly to obstruct the functioning of the grand jury (18 U.S.C. 1503) was not rendered lawful simply because it took the form of providing the witness with legal advice. There is nothing novel in the proposition that conduct, lawful in itself, may become unlawful when accompanied by an unlawful intent. See, *e.g.*, *Badders* v. *United States*, 240 U.S. 391, 394 (1916) (Holmes, J.).[1] The courts have

[1] The court of appeals offered the following example (Pet. App. A48-A49): "[I]t is lawful—again, commonplace—to

recognized that a person subjects himself to criminal liability when he advises another to invoke his Fifth Amendment privilege for the improper purpose of obstructing a grand jury investigation. See *United States* v. *Arnold*, 773 F.2d 823, 834 (7th Cir. 1985); *United States* v. *McComb*, 744 F.2d 555, 563 (7th Cir. 1984); *United States* v. *Baker*, 611 F.2d 964, 967-969 (4th Cir. 1979); *United States* v. *Cioffi*, 493 F.2d 1111, 1119 (2d Cir.), cert. denied, 419 U.S. 917 (1974); *Cole* v. *United States*, 329 F.2d 437, 440-442 (9th Cir.), cert. denied, 377 U.S. 954 (1964). The same rule should apply when a lawyer joins a conspiracy to accomplish that end by, among other corrupt means, providing manipulative legal advice. Cf. *United States* v. *Fayer*, 523 F.2d 661, 663 (2d Cir. 1975) (dictum).

Petitioner suggests (Pet. 24) that allowing juries to draw adverse inferences from "traditional attorney conduct" might have a "chilling impact" on Fifth and Sixth Amendment rights. The court of appeals was sensitive to that possibility but correctly concluded that such concerns were not implicated in this

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offer an acquaintance a lift to the airport. Nevertheless, if a person were to provide such transportation at precisely the same time and in precisely the same way, but with the corrupt purpose that the prospective passenger be spirited away so as to thwart his scheduled appearance before a grand jury, the impure motive alone would convert the otherwise-lawful gesture into an outright obstruction of the grand jury's mission—an obstruction which, most would concede, would be criminalized by [18 U.S.C.] 1503." As the court of appeals explained (*id.* at A49-A50), "the 'advice' given by [petitioner] in the manipulation of his own client was a commodity no different than * * * the free ride. It was legal to traffic in the wares, but illegal corruptly to put them to felonious use."

case because petitioner's "representation of LaFreniere was in no sense 'traditional' " (Pet. App. A57). As the court explained (*ibid.* (emphasis in original)):

> the evidence makes manifest that [petitioner] acted less as an attorney for LaFreniere than as a minion of Angiulo. Indeed, the jury heard recorded conversations which revealed, from [petitioner's] own mouth, that he was laboring mightily to get his ostensible client *into* jail, rather than to keep him out of it. Far from using the wonted tools of the lawyer's trade to ameliorate LaFreniere's legal position, [petitioner] helped Angiulo to place him in a vise and to turn the screw. An attorney who spurns the interests of his own client and conspires to subject him to a prison term for the benefit of a third party is not performing the traditional functions of defense counsel. Such an attorney is not, on any view of the matter, entitled to special perquisites and privileges.

Petitioner faults the trial court (Pet. 27-28) for refusing to instruct the jury that "his filing motions, taking appeals, and giving advice had to be predominately motivated by [an] improper purpose in order to be viewed as an obstruction of justice."[2] Peti-

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[2] The trial judge instructed the jury in pertinent part as follows (5/27/85 Tr. 96-97):

> LaFreniere had the right to plead the Fifth Amendment before the grand jury if he honestly believed that a truthful answer might incriminate him, and someone advising LaFreniere of that right is not guilty of any offense.
>
> On the other hand, if the advice is given to protect somebody else, that is, a witness before the grand jury who has the right to plead the Fifth Amendment is told

tioner cites no authority for his requested instruction. Indeed, analogous cases indicate that mixed motivations do not relieve a defendant of culpability. For example, the courts have held that a federal conspiracy offense may be proved even if the violation of federal law is a secondary or minor purpose of the conspiracy. See *Anderson* v. *United States*, 417 U.S. 211, 226 (1974); *Ingram* v. *United States*, 360 U.S. 672, 679-680 (1959). And certainly it is no defense to a burglary prosecution that the defendant entered the premises in question with the intent to commit a lawful act therein in addition to committing larceny. In short, there is no legal basis for petitioner's requested instruction.[3]

> [to] do so by someone who is seeking thereby to obstruct the grand jury investigation, then on that hypothesis, there is an obstruction of justice in violation of the criminal law.

After a bench conference, the judge then supplemented his instructions (*id.* at 116-118), adding in part (*id.* at 117):

> Such matters as appealing or postponing, et cetera, can be quite appropriate and proper, and no indication of illegality of any sort. On the other hand, they can be, under the principles that I have explained to you, an obstruction of justice, and the answer is it depends. It depends on all the circumstances, and quoting from that same case as I mentioned before, the focus is on the intent or motive of the party charged * * *.

[3] Petitioner also faults the trial court for failing to instruct the jury that "mistakes of fact, errors of law, and bad judgment are not the equivalent of corrupt purpose" (Pet. 28). That instruction, however, was plainly encompassed by the court's explanation that to act "corruptly" for purposes of 18 U.S.C. 1503, one must "act knowingly and dishonestly with the specific intent to subvert or undermine the integrity of the grand jury proceeding * * *" (5/27/85 Tr. 95).

Petitioner also claims, incorrectly, that the court of appeals' decision conflicts with other authority. The cases he cites (Pet. 19, 27), however, are plainly distinguishable. In *Maness* v. *Meyers*, 419 U.S. 449 (1975), this Court determined that an attorney who had advised his client to invoke the Fifth Amendment based on the attorney's good faith belief that the client had a valid privilege should not be subject to contempt sanctions. See *id.* at 455, 465-466. Here, petitioner's conduct was the very antithesis of good faith.[4] In *McNeal* v. *Hollowell*, 481 F.2d 1145 (5th Cir. 1973), cert. denied, 415 U.S. 951 (1974), the court of appeals held that a habeas corpus applicant was entitled to double jeopardy protection when his first trial ended in a mistrial after a key witness invoked the Fifth Amendment and refused to testify. The court concluded that the applicant's attorney did not solicit the mistrial by contacting the witness and his counsel concerning the witness's proposed testimony. The court stated that the attorney's contact did not "even tangentially" involve bribery, coercion, or threats to the witness and "was wholly different than the secretion of a witness suggested by the State" (481 F.2d at 1152). Instead, the case involved "no more than the legitimate action of a defense counsel who was contacting an important witness—a co-indictee—and his counsel to discuss a matter of mutual importance to them" (*ibid.*). Thus, *McNeal* differs strikingly from the instant case, where petitioner attempted to protect a third party

[4] The court of appeals stated that "we are scrupulously faithful to *Maness* and [*In re Watts*, 190 U.S. 1 (1903)], insofar as they have pertinence, when we lay stress on the evidence from which the jury could logically have inferred [petitioner's] corrupt motive" (Pet. App. A54).

by advising his own fully immunized client to place himself in contempt of court.[5]

2. Petitioner also contends (Pet. 28-32) that the trial court erred in excluding as hearsay certain notes, which petitioner claims LaFreniere prepared, that describe LaFreniere's recollection of certain events relative to his subpoena and appearance before the grand jury. See Pet. App. A85. Petitioner argues that the notes are admissible for non-hearsay purposes because they demonstrate that LaFreniere had a "fixed intention" not to testify or otherwise cooperate with the government, and that the notes are relevant to petitioner's state of mind (Pet. 30).

The court of appeals correctly held the notes inadmissible. As the court explained (Pet. App. A86-A87), the notes contain no reference to any "fixed intention" of LaFreniere to refuse cooperation with the government. They consisted of "nothing more than a factual recitation of events taking place incident to LaFreniere's grand jury appearance" (*id.* at A86). The court of appeals also correctly concluded that the notes had no bearing on petitioner's mental state. And, as the court of appeals further concluded, the probative value of the notes, to the extent that they may have had any bearing at all on petitioner's mental state, was "so exiguous as to be easily outweighed by the improper truth-of-the-matter use

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[5] Petitioner also relies on the district court decision in *United States* v. *Herron*, 28 F.2d 122 (N.D. Cal. 1928). The Ninth Circuit, however, has expressly rejected *Herron*'s holding that it is not unlawful, no matter what one's motive, to advise a witness to invoke his Fifth Amendment privilege. *Cole* v. *United States*, 329 F.2d at 441-442. Moreover, in *Herron* the witness had a valid privilege; here LaFreniere did not.

which the jury might be tempted to make of them" (*id.* at A87 n.12).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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